IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH AT HYDERABAD

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P.Nos.23748 of 1996 & 4077 of 1997

Writ Petition No.23748 of 1996
DATED 9-2-2007

BETWEEN
T.Somaiah

.. Petitioner

And

The Chairman,
Vijaya Electricals Pvt. Ltd.,
Balanagar, Hyderabad and another.

.. Respondents

THE HONOURABLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION NO.23748 of 1996 & 4077 of 1997

COMMON ORDER:

Aggrieved by the award of the Additional Industrial Tribunal-cum-Additional Labour Court, Hyderabad in I.D.No.26 of 1995 dated 27.4.1996, whereby the workman was directed to be paid three years wages as compensation in lieu of the relief claimed by him, both the management and the workman have approached this Court by way of these writ petitions.

While the workman would contend that he is entitled to be reinstated into service, the employer would contend that since the

workman had voluntarily abandoned his job, he is not entitled to be paid any compensation whatsoever. The facts as noted in the award of the Tribunal may briefly be referred to.

The workman was appointed as a Machinist on 1.12.1982 and was confirmed with effect from 1.4.1985. He was working with the employer till 12.4.1992. He applied for leave from 12.4.1992 to 30.4.1992 and again from 2.5.1992 to 15.5.1992 by giving Exs.M.1 and M.2 applications respectively on the ground of ill-health. The said leave was sanctioned but, however, he did not report for duty from 16.5.1992 onwards. It was only for the first time on 8.4.1994 that the petitioner had addressed a letter to the employer offering to resume duty. According to the workman, his name continued to be shown on the rolls of the company till 31.7.1994 despite which he was not taken back to duty. The employer would contend that the very fact that the workman had abstained from duty and was unauthorisedly absent for a period of nearly two years would indicate that he had voluntarily abandoned his job. It is the case of the employer that they did not terminate the services of the workman and instead, it was the workman himself who abandoned his job and the very fact that he abstained from duty and was unauthorisedly absent for a period of nearly two years would necessitate such a conclusion being drawn. On the other hand, it is the case of the workman that, since he was afraid of the police, he had absconded from duty from May 1992 to February 1994 and that the employer was not justified in not permitting him to join duty without terminating his services and without a departmental enquiry being conducted in this regard.

The Additional Industrial Tribunal held that the workman had himself abstained from duty from 16.5.1992 as he was afraid of the police, that he wanted to resume duty from January or February 1994, that the employer had been showing in its attendance register that the workman was absent from duty and when the employee sent Ex.M.4 letter dated 8.4.1994 offering to resume duty, the employer did not give a reply thereto, that the name of the workman was shown in the attendance register upto 31.7.1994 and that no charge was issued to him for his absence from duty and neither an enquiry was conducted nor appropriate orders were passed after an enquiry in this regard. The Tribunal held that both the parties were at fault. While the workman had absconded from duty as he was afraid of police from May, 1992 to January or February 1994, the employer was at fault for not conducting an enquiry against the workman for his absence from duty. Accordingly, the Industrial Tribunal held that since the Supreme Court had held that a clause in the Certified Standing Orders of the Company, that an employee would loose his lien on the job for his unauthorized absence from duty was illegal and that the management could not terminate the services of any employee basing on this clause, and as the workman was out of employment for four years and he had served for more than 10 years and since the employer was not willing to take him back either due to his trade union activity or his naxalite activity, the employer should pay wages of three years as compensation to the workman in lieu of the reliefs claimed by him.

Sri P.Nageswar Sree, learned counsel appearing on behalf of the employer would contend, placing reliance on **Chief Engineer**

(Construction) v. Keshava Rao [1] that the very fact that the workman had abstained from duty and was unauthorisedly absent for a period of nearly two years would necessitate a conclusion being drawn that he had voluntarily abandoned his job and inasmuch as the workman, on his own volition, had left the services of the employer, the employer and employee relationship had ceased to exist. Learned counsel would contend that the judgment in **D.K.Yadav v. JMA Industries** [2] had no application inasmuch as in the said case, the clause in the Certified Standing Orders, that an employee who was absent from duty for more than eight days was held to have lost his lien was held to be illegal. Learned counsel would submit that unlike in D.K.Yadav[2], in the present case, the workman had, admittedly, abstained from duty and was unauthorisedly absent for a period of nearly two years. Learned counsel would submit that as the workman had voluntarily abandoned his job, the Tribunal had erred in directing payment of compensation of three years wages in lieu of reinstatement. Learned counsel would contend that the Labour Court has not given any reasons as to why compensation of three years wages should be paid and, therefore, the award of the Additional Industrial Tribunal is required to be set aside.

Smt. Padma Saranappa, learned counsel for the workman, on the other hand, would contend that as long as the services of the workman had not been terminated, the employer - employee relationship continued to exist and since, in the present case, admittedly, no chargesheet was issued to the workman and no enquiry was held nor was any order of termination passed, the

workman was entitled to be reinstated into service and at the best, the employer could impose a penalty after issuing a charge memo and conducting a departmental enquiry in this regard. Learned counsel would submit that, since the workman had more than 15 years of service still left when the award was passed, the Tribunal erred in directing payment of compensation of three years wages in lieu of reinstatement and that the workman ought to have been reinstated into service and paid backwages at least from the date on which he had expressed his willingness to join duty i.e from 8.4.1994. She has placed reliance on **D.K.Yadav**[2] and **Samiullah Khan v. Labour Court, Godavarikhani**[3].

Section 2(oo) of the Industrial Disputes Act, 1947 (for short 'the Act') defines retrenchment to mean termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include

a) voluntary retirement of the workman; or

b) retirement of the workman on reaching the age of superannuation, if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or'

(bb) termination of the service of the workman as a result of the non-renewal of the contract of the employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

c) termination of the service of a workman on the ground of

continued ill-health.

Since no punishment was inflicted on the workman by way of disciplinary action, and none of the exceptions to Section 2(oo) of the Act are applicable, the termination, even if it is presumed to be deemed termination as contended by the employer, would fall within the definition of retrenchment under Section 2(oo) of the Act since the definition of retrenchment is wide enough to include termination by the employer of the services of the workman, **for any reason whatsoever**. While it is true that the employer has not terminated the services of the workman, the fact remains that even in the attendance register produced before the Tribunal, the workman was shown to be on the rolls. Cessation of an employer-employee relationship would require a positive act either by the employer or by the employee indicating an intention to put an end to such a relationship. Since no order of termination had been passed by the employer nor did the workman express his intention to leave the services of the employer, the theory of voluntary abandonment cannot be brought in to hold that the workman had left the services of the employer on his own volition and thereby had ceased to be the employee of the company. Such a submission is fraught with dangerous consequences, for even in case of absence for a short duration it could well be contended by the employer that the workman had voluntarily abandoned his job resulting in cessation of employer-employee relationship thereby obviating the need of complying with the requirement of taking disciplinary action or to comply with the protective measures prescribed under the provisions of the Act.

In **Kesava Rao**[1] relied upon by Sri P.Nageswar Sree, Rule 2505 of the Railway Manual arose for consideration, which provided that engagement of an employee stands terminated, if he is unauthorisedly absent beyond the prescribed period of three days. According to the railways, the respondent had abandoned his work on 1.11.1977 and did not report for duty thereafter and consequently he was marked absent in the muster rolls and being a casual employee, his name was deleted from the muster roll after five weeks' continued absence from the alleged date of abandonment. About a year and 5 months later, the workman served a notice upon the Railways alleging that his services were terminated illegally. The Railways took the stand that since the respondent-workman never turned up for work, and as he was unauthorisedly absent from duty, his engagement stood automatically terminated under Rule 2505 of the Railway Manual and since the workman had voluntarily abandoned his services, there is no question of issuing any notice to him. On a dispute being referred, the Tribunal on considering the relevant Rules, came to the conclusion that since the workman was employed in connection with the project work as a casual labourer, the Rules did not entitle him to be granted temporary status. The Tribunal recorded a finding of fact that from 1.11.1977 onwards, the respondent had not worked even for a single day and long thereafter he had set up a claim for reinstatement. The Tribunal found that the plea of the workman was not justified and he had, in fact, abandoned his services with effect from 1.11.1977 and accordingly the Tribunal rejected the reference. Thereafter the workman preferred a writ petition before the High Court of Karnataka, which held that since it was not the case of the management that the

project work was over and the services of the workman were no longer required, the question which arose for consideration was whether it was a case of termination or a case of voluntary abandonment. The Karnataka High Court observed that merely on the basis of muster rolls, the Tribunal could not have jumped to the conclusion that the respondent-workman had abandoned his services. The Karnataka High Court held that since the petitioner had been appointed as a casual labourer and had continuously worked and had put in continuous service as contemplated by Section 25-B of the Act and as there was no compliance of the provisions of Section 25 F of the Act, termination of his services was not legally sustainable. The Supreme Court found fault with the said finding and observed that the learned Judge had completely lost sight of the fact that the initial burden of establishing the factum of continuous work for 240 days in a year rested with the workman and unless the initial burden was discharged and the appellant had failed to produce evidence in rebuttal, such a finding could not have been recorded by the learned Judge. The Supreme Court observed thus;

> "we are of the view that this appeal should be allowed. The Labour court recorded two crucial findings of fact, namely, that the respondent was engaged as a casual labourer in connection with project work, and secondly, that he had abandoned his service and the allegation that he was prevented from joining his duties on 1.11.1977 was not true. These were findings of fact recorded by the Tribunal on the basis of evidence on record. The muster roll, no doubt , supported the case of the appellant that after 1.11.1977 he did not report for duty. We cannot lose sight of the fact that thereafter till 4.4.1979 the respondent did nothing to assert his right of reinstatement. The delay of a year and 5 months in

> issuing a notice appears to us to be significant. Apart from this, no evidence was led by the respondent workman that he had made any effort to seek reinstatement or complained against the action of the management to anyone. There is no material whatsoever to suggest that he had made a grievance about it before any authority or before the worker's union.
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> We have further found that the learned Judge, whose finding was affirmed by the Division Bench, fell into an error in thinking that the reply given by the appellant to the notice of the respondent justified the order of termination. As we have noticed earlier, the learned Judge misread the reply given by the appellant Railways in which it was clearly asserted that the respondent had abandoned his service and therefore, in terms of the rules, his name was deleted form the muster roll. There is nothing in the reply to the notice which is even suggestive of the fact that the appellant accepted the fact that the services of the respondent were terminated, or that there was justification for such termination. The finding of the Tribunal therefore, did not suffer from the vice of perversity or unreasonableness. In fact the High Court was in error in interfering with the findings of fact recorded by the Tribunal."

It is true that like in Kesava Rao[1], in the present case also, the workman had abstained from duty for a period of nearly two years and though evidence was let in by the employer and the workman before the Labour Court, the Labour Court, merely on the ground that no enquiry was held, found fault with the employer and in lieu of reinstatement, directed payment of compensation of three years wages.

It is well settled that, merely because no domestic enquiry is held, the Tribunal/Labour Court is not entitled either to direct

reinstatement of the workman concerned or to direct payment of compensation in lieu of reinstatement. As held by the Supreme Court in **P.H.Kalyani v. Air France, Calcutta**[4] and **Engineering Laghu Udyog Employees' Union v. Judge, Labour Court and Industrial Tribunal**[5] even in cases where no enquiry is held, it is open for the employer to adduce evidence before the Tribunal in support of its contention that the termination of the services of the workman was justified and in case, on the basis of the evidence on record, the Tribunal accepts the contention of the employer that the termination of the services of the workman was justified, then the order of termination would be deemed to relate back to the date on which it was passed. In the case on hand, the employer had adduced evidence in support of its contention that the workman had remained unauthorisedly absent for a period of nearly two years. As to whether such admitted unauthorized absence from duty for such a long period of two years would justify the employer's contention that his services must be held to be automatically terminated and his having lost his lien on his job are all matters which the Tribunal ought to have examined on the evidence on record. Even in cases where the Tribunal, in exercise of its jurisdiction under Section 11-A of the Act or for violation of the mandatory requirements of Section 25-F of the Act or other provisions of the Act, is of the view that the order of termination or cessation of employer - employee relationship was not justified, even then, it is not required to direct reinstatement of the workman in every case and it is entitled to direct payment of compensation in lieu of reinstatement. The quantum of compensation to be awarded

in lieu of reinstatement is no doubt a matter of discretion but such exercise of discretion by the Tribunal/Labour Court must be based on reasons and cannot be on the mere whim or fancy of the Tribunal/Labour Court. Reasons must be assigned in justification of the quantum of compensation, which the Labour Court intends to grant in lieu of reinstatement. In the present case, no such reasons have been assigned by the Tribunal/Labour Court.

Reliance placed by Smt.Padma Saranappa on **D.K.Yadav**[2] is of no avail. In the said case, the workman was absent from duty from 3.12.1980 and, on 12.12.1980, just 9 days thereafter, the employer sent a letter informing him that since he had willfully absented from duty continuously for more than 8 days, he must be deemed to have left the services of the company on his own account and to have lost his lien on the appointment with effect from 3.12.1980. Reliance was placed on Clause 13(2) (iv) of the Certified Standing Orders of the company which provided that if a workman remained absent without sanctioned leave, he would lose his lien on his appointment unless he returned within 8 days of commencement of the absence or on expiry of the leave originally granted and explained to the satisfaction of the management the reasons for his absence. Placing reliance on Section 2(oo) and Section 25 F of the Act, the Supreme Court held that principles of natural justice must be read into standing order 1324 and since the management did not conduct any enquiry nor gave the workman an opportunity to put forth his case, the workman should be reinstated and be paid 50% of the back wages. The question as to whether even in a case where no enquiry was held the right of the employer

to adduce evidence before the Tribunal in justification of the order of termination did not arise for considerations in D.K.Yadav. As such, the judgment is of no assistance to the workman.

In **Samiullah Khan v. Labour Court, Godvari Khani (3)** a learned Single Judge of this Court held that the High Court would not interfere with the award and grant the relief which the Tribunal could have granted under Section 11-A of the Act. It is necessary to note that in this case, the labour Court has not properly exercised its jurisdiction under Section 11-A. It is well settled that this Court in Certiorari proceedings would not sit in appeal over the orders of the Tribunal nor would it substitute its view for that of the Tribunal. Jurisdiction exercised by this Court is supervisory and not appellate. The award of the Labour Court suffers from an error on its face, inasmuch as the Tribunal has not considered the evidence on record to decide as to whether the workman, on account of the admitted unauthorized absence, had lost his lien on the job and whether absence for such long duration had resulted in cession of employer and employee relationship. Further, no reasons have been assigned as to why compensation of 3 years wages should be granted in lieu of reinstatement.

The award of the Additional Tribunal-cum-Labour Court in I.D. No.26 of 1995 is quashed and the matter is remanded for its consideration afresh, in accordance with law. Since the dispute relates to the year 1995, and more than a decade has passed since then, it is appropriate that the Additional Industrial Tribunal hear both sides and decide the matter as expeditiously as possible in any event not later than 4 months from the date of receipt of a copy of

this order.

Both the writ petitions are disposed of accordingly.

RAMESH RANGANATHAN,J

Dt: 9.2.2007
msv.

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[1] 2005(11)SCC 229

[2] (1993) 3 SCC 259

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[3] 1997(1) An.W.R.19

[4] AIR 1963 SC 1756

[5] 2004(5) ALD 18 (SC) – (2003) 12 SCC 1